FILED
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HAROLD B. WILLEY, CL

No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1954

LOUIS B. SAPERSTEIN, PETITIONER

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, AND TO THE SUPREME COURT OF NEW JERSEY.

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September 17, 1954.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, AND TO THE SUPREME COURT OF NEW JERSEY.

Petitioner prays that a writ of certiorari issue to review the judgments of the Superior Court of New Jersey, Appellate Division, and of the Supreme Court of New Jersey, in the above cause.

OPINIONS BELOW

The Essex County Court's opinion and order (R. 9a-11a)[1] are unreported. The opinion of the Superior Court of

[1] Page references to the record ("R.") refer to the Appendix attached to the Petition for Certification filed in the Supreme Court of New Jersey. Pursuant to Rule 21, paragraph 4, of the Rules of this Court, nine additional copies of the record as printed in the Supreme Court of New Jersey have been filed with the Clerk of this Court for consideration by this Court. Accordingly, pursuant to Rule 23, paragraph 1 (i), of the Rules of this Court, only the orders of the Supreme Court of New Jersey are included in the Appendix to this petition for a writ of certiorari.

New Jersey, Appellate Division (R. 14a-22a), affirming the order of the Essex County Court, is reported as *In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842. The Supreme Court of New Jersey's order, denying petitioner's Petition for Certification, is reported at 15 N.J. 613, 106 A.2d 41. Its further order, denying petitioner's Petition for Reconsideration, is unreported. Apart from these two orders the Supreme Court of New Jersey did not render an opinion.

JURISDICTION

On April 19, 1954 the Superior Court of New Jersey, Appellate Division, entered its order (R. 22a) affirming the order of the Essex County Court by virtue of which, petitioner contends, his constitutional rights under the Due Process Clause of the Fourteenth Amendment are infringed. Petitioner thereafter filed a timely Petition for Certification which was denied on June 21, 1954 by the Supreme Court of New Jersey, one Justice dissenting. Petitioner filed a timely Petition for Reconsideration which was denied on June 28, 1954, "no Justice who voted with the majority having moved for a reconsideration". Accordingly, a final judgment has been rendered by the highest court of New Jersey in which a decision could be had, and the jurisdiction of this Court to issue a writ of certiorari is invoked pursuant to 28 U.S.C. § 1257.

On July 13, 1954 Mr. Justice Black ordered that all further proceedings in the case be stayed pending the timely filing and disposition of a petition for writ of certiorari.

QUESTION PRESENTED

Pursuant to New Jersey's version of the Uniform Witness Act, this proceeding was instituted against petitioner in the County Court of Essex County by respondent, The People of the State of New York, to obtain an order requiring petitioner to appear as a witness before the Grand

Jury of New York County and there to produce a variety of specified books and records. Petitioner is a resident of New Jersey engaged in the insurance business in New Jersey, and no showing was made that any of the books and records involved had ever been in New York or were ever required by law to have been kept in New York. Nevertheless, the New Jersey courts have sustained an order which requires petitioner to transfer those books and records to New York, absolutely and unconditionally and without any safeguards against their being impounded or indefinitely detained in New York.

The question presented for this Court's consideration is whether such an order for compulsory transfer of his books and records—when it is made under a statute affording no safeguards for books and records and when the order is not accompanied by reasonable safeguards of any nature whatsoever—infringes petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides in part:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law;"

New Jersey and New York have each enacted substantially reciprocal statutes conforming generally to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (see 9 Uniform Laws Annotated pp. 37-48, and 1953 Supp. pp. 16-18). The New Jersey statute is entitled "Uniform Act to Secure the Attendance of Witnesses From Within or Without a State in Criminal Proceedings" and appears in New Jersey Stat-

utes 2A:81-18 through 2A:81-23. With respect to summoning witnesses within New Jersey to testify in another state the Act provides (New Jersey Statutes 2A:81-19) that:

> "If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and his presence will be required for a specified number of days, and that same cannot be insured voluntarily, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
>
> "If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.
>
> "If said certificate recommends that the witness be taken into immediate custody and delivered to an of-

ficer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

"If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state."

The comparable New York statute is set forth in Section 618-a of the New York Code of Criminal Procedure. With respect to witnesses summoned to appear in New York from some other state it provides, in part, in subsection 4:

"4. Exemption from arrest and service of process.—If a person comes into this state in obedience to a subpoena directing him to attend and testify in this state he shall not while in this state pursuant to such subpoena or order be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena."

STATEMENT OF THE CASE

This is a proceeding instituted pursuant to the New Jersey and New York reciprocal provisions of the Uniform Witness Act, referred to at pages 3-5 above.

On February 24, 1954 the Assistant District Attorney, New York County, presented to the Court of General Sessions of New York County an affidavit reciting that an investigation was being conducted by the New York County Grand Jury into the insurance welfare funds of certain labor unions and the activities of certain insurance agents who placed, with various insurance carriers, contracts of life, accident and health insurance for the benefit of members of various labor unions (R. 5a-7a). The affidavit recited that petitioner was a resident of South Orange, New Jersey, and was conducting an insurance business in Newark, New Jersey. It further recited that petitioner, individually and through one or more incorporated insurance agencies with which he had been connected, had placed, with various insurance carriers, contracts of life, accident and health insurance for the benefit of members of various labor unions in New York County; that it was necessary for petitioner to appear before the Grand Jury to determine whether violations of the New York law had been or were being committed in this connection; that petitioner was a material and necessary witness; and that the specified books and records of petitioner likewise were material and necessary. The affidavit requested that the Court of General Sessions issue a certificate certifying these facts to the courts of the State of New Jersey.

The same day, February 24, 1954, and on the basis of this affidavit, the Court of General Sessions issued such a certificate (R. 1a-4a). Included in the certificate was a certification—as required by the reciprocity provisions of the Uniform Act—that the laws of the State of New York would give petitioner, while in New York in obedience to an order requesting him to testify before the Grand Jury, protection from arrest and the service of process in connection with matters which arose before his entrance into New York under such order. Respondent, The People of the State of New York, presented this certificate to the County

Court of Essex County, New Jersey, which issued an order to show cause on February 25, 1954 (R. 8a-9a).

On February 26, 1954, the Essex County Court issued an order (R. 10a-11a) which ordered and directed petitioner,

> "together with his following books and records of account, to attend and testify before the Grand Jury of the County of New York, at 155 Leonard Street, County, City and State of New York, commencing on March 2, 1954, at 2 o'clock in the afternoon, and from day to day thereafter on the order of the foreman of the said Grand Jury, until he shall have completed his testimony, but for a period not exceeding fourteen days from the date of his first appearance:
>
> Check stub books;
>
> bank statements and cancelled checks;
>
> in addition to the foregoing, all papers, books, documents, records and data pertaining to and concerning any contracts of life, health and accident insurance placed with various insurance carriers for the benefit of members of labor unions located in the County of New York.
>
> all of the above from January 1, 1950, to December 31, 1953, inclusive."

This is the order which—as kept in effect by the appellate judgments of the New Jersey state courts—is the subject of petitioner's constitutional contentions here.

The order was affirmed on April 19, 1954 by the Superior Court of New Jersey, Appellate Division, which wrote a lengthy opinion, construing the New Jersey statute as requiring compulsory production of books and records (as well as the appearance of the witness in person) in the demanding state and holding that the statute as thus construed is constitutional (R. 14a-22a). As already stated at page 2 above, the Supreme Court of New Jersey on June 21, 1954 denied petitioner's Petition for Certification and on June 28, 1954 denied petitioner's Petition for Reconsideration.

The federal question on which petitioner relies does not relate to the requirement that he himself appear in the State of New York as a witness before the Grand Jury there. His personal appearance was subject to the specific statutory safeguards, embodied in the laws of both New Jersey and New York (New Jersey Statutes 2A:81-19; New York Code of Criminal Procedure §618-a), that it must not cause undue hardship to the witness to be compelled to attend and testify in the other state and that the laws of the other state must grant the witness protection from arrest and the service of process. In fact, petitioner has already appeared to testify before the New York County Grand Jury.[2]

The federal question presented arises rather because of the requirement, which would result from the statute and judgments under review, that petitioner remove and transfer the particular books and records specified from the State of New Jersey, where he resides and is engaged in business, to the State of New York—and that this be done without safeguards of any nature whatsoever being provided in connection with such compulsory transfer. In this respect petitioner contends he is being denied his rights and deprived of his property in violation of the Due Process Clause of the Fourteenth Amendment.

The state courts, having construed the New Jersey statute as applicable to petitioner's books and records, have sustained an order requiring him to transfer such books and records to another state without any appropriate safeguards being provided—either in the statute itself or in the court order—in connection with such compulsory transfer. In an effort to save the statute from unconstitution-

[2] As a result of his personal appearance as a witness before the New York County Grand Jury, petitioner was indicted on five counts of criminal contempt which charged that he had refused to answer certain questions propounded by the Grand Jury. He was convicted and a sentence of five years imprisonment was imposed. The conviction is now on appeal in the New York courts.

ality the Superior Court of New Jersey, Appellate Division, read into the statute some implied safeguards for books and records, stating: "We think it is within the authority of the New Jersey Court to prescribe such condition as may be necessary for the protection of the witness' books and records" (R. 21a). But since, even if the court had any such power, the court in no way modified the order so as to give petitioner the benefit of any safeguards at all with respect to his books and records, petitioner's position is that his federal rights have been denied by the New Jersey courts just as effectively as if the statute had not been helped along by such construction. Compare *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18 (1948) and cases cited.

The federal question is adequately presented and preserved in the record. The opinion of the Superior Court, Appellate Division—presumably in response to the question of "due process of law" raised by petitioner's brief in that court (pp. 9-11 of that brief)[3]—expressly discussed and sustained the constitutionality of the statute as interpreted and applied to petitioner by the order of the Essex County

[3] The contentions which that court was intending to pass upon in the opinion may be seen from the following excerpts from petitioner's brief in that court:

"We doubt whether a state can send one of its citizens into another state and compel him to bring his records without safeguarding both his person and his property. The absence of such safeguards could readily deprive one of his person and his property without due process of law." (p. 10)

* * * * * * *

"As we have previously shown, the statute does not safeguard and protect books, records, and other objects from retention, seizure, confiscation or process. If the statute failed to afford full protection to the witness against arrest and process, it would be unconstitutional in that it would permit unlawful and oppressive measures against him. Cf. *In Re Cooper*, 127 N.J.L. 312, 313 (Sup. Ct., 1941). Such protection must necessarily be given the person, otherwise there is no due process. Similarly, a statute which does not give equivalent protection with respect to his books, records and other objects is likewise unconstitutional.

"The order fails to afford full protection. So does the statute in this regard." (p. 11)

Court (R. 21a). While the opinion does not explicitly mention the Fourteenth Amendment by name, petitioner's position is that a fair reading of the record makes it sufficiently clear both that the Superior Court, Appellate Division, understood the Fourteenth Amendment was invoked and that the court was passing on this issue. The constitutional question of deprivation of property without due process of law was preserved in the Petition for Certification to the Supreme Court of New Jersey (pp. 1, 10, 18-19) in a context which makes it clear—though the Fourteenth Amendment is not mentioned by name—that petitioner's rights under the Fourteenth Amendment were being asserted. In addition, in the Petition for Reconsideration (p. 1), which was considered by the Supreme Court of New Jersey, "the Due Process Clause of the Federal Constitution" was explicitly mentioned (p. 1).

It should be noted also that the New Jersey Constitution does not contain a Due Process Clause of its own. Its most nearly comparable provision is in Article I, Paragraph I:

> "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Accordingly, the question of due process of law as raised in this case appears to have been intended and understood to be a question arising under the Fourteenth Amendment of the Federal Constitution, adequately presented within the rule of *Copperweld Steel Co.* v. *Industrial Comm.*, 324 U. S. 780, 785 (1945).[4] See also *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 69 (1928).

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[4] This Court there ruled (324 U.S. at 785):

"We think that the appellant disclosed, and the court below understood, that the provisions of the Fourteenth Amendment of

REASONS FOR GRANTING THE WRIT

In the present case the state courts of New Jersey have decided a federal question of substance, not heretofore determined by this Court, on which it would be in the public interest for this Court to rule.

While the federal question is novel in this Court, it is of general importance to the proper administration of the law. Review by this Court would provide not merely an opportunity for obtaining an authoritative adjudication of the rights of this petitioner alone; it would also serve a considerably broader public purpose.

In this connection it will be noted that the Uniform Act here involved—that is, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings—has been enacted in fairly similar form in more than forty states. See 9 Uniform Laws Annotated pp. 37-48, and 1953 Supp. pp. 16-18; *State* v. *Blount*, 200 Ore. 35, 41, 264 P. 2d. 419, 422 (1953), certiorari denied, 347 U. S. 962 (1954). Under any of these numerous state statutes the federal question here presented might easily arise. Its determination by this Court would therefore be a contribution to settling the law in this important field and would enable the state law enforcement authorities throughout the country to know what procedural measures may be taken under the Uniform Act consistent with constitutional requirements.

As the New Jersey court recognized in its opinion in this case (R. 21a-22a), by 4 U.S.C. § 111 the Congress has

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the Federal Constitution were invoked. Not only does the Ohio Constitution embody no provisions in the words of that Article but it is doubtful that it contains any equivalent provisions. While the appellant's petition did not mention the Amendment it used the exact phraseology in which it is couched. The pleadings and the expressions found in the opinions lead us to conclude that questions under the Federal charter were presented and considered."

given great encouragement to interstate cooperation in the field of prevention of crime and the enforcement of criminal laws. This field clearly is one where it is essential that cooperative relations between the states be maintained. But it is equally essential that this be done in ways which will not deny to individuals affected the basic safeguards guaranteed by the Due Process Clause. And there is nothing to suggest that the Congress intended—or indeed would be empowered to provide—that such interstate cooperation should be carried on without full respect for such procedural safeguards as the Due Process Clause requires.

The facts of the present case give emphasis to the arbitrary nature of a procedure which omits to provide any reasonable safeguards surrounding the compulsory transfer of records from the state where an individual lives and carries on his business to another state which makes an unconditional demand.

From the record it appears that petitioner is a resident of New Jersey and doing business in New Jersey. It does not appear from the record that he has ever been a resident of New York. It does not appear from the record that the particular books and records in question have ever been in New York, or that they were required by law to be kept in New York. The books and records cover a full four-year span (1950 through 1953) of petitioner's affairs.

Under these circumstances, petitioner's contention is that his rights under the Due Process Clause of the Fourteenth Amendment have been violated by an order, made under a statute which affords no safeguards for books and records, compelling him, absolutely and unconditionally and without safeguards of any nature whatsoever, to transfer those books and records to the State of New York. Petitioner's position is that, in the absence of appropriate safeguards,

the Due Process Clause of the Fourteenth Amendment protects him from being required to make a compulsory transfer of the records out of the state where he resides and is doing business and into another state where they may become entirely vulnerable to detention and impounding for an indefinite period of time. If the State of New Jersey wishes to require its own citizens to remove their books and records into another state at the behest of the other state, New Jersey has an obligation to do so in accordance with "the traditional notions of fair play and substantial justice implicit in due process". *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1941). Petitioner contends that in the circumstances disclosed by this record such basic standards of fairness have not been met.

In assessing whether the state court action in the present case measures up to these fundamental standards of fairness, appropriate weight must be given to prior decisions of this Court concerning the constitutional limitations on the power to compel production of books and records. Power to command by a subpoena *duces tecum* is a mighty power of government, whether exercised by state or by federal officials. Use of this power by federal officials has been held subject to the requirement of the Fourth Amendment that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . " Accordingly, since "an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment", the power cannot lawfully be exercised in an unreasonable manner. *Hale* v. *Henkel*, 201 U. S. 43, 76-77 (1906); *Application of Harry Alexander, Inc.*, 8 F.R.D. 559, 560 (S.D.N.Y. 1949). This Court, for example, recently has summarized the law as to limitations on the scope of such a subpoena by stating: "The gist of the protection is in the requirement, expressed

in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 208 (1946).

Comparable criteria of reasonableness are applicable to the obligation of the states to carry out their own responsibilities in a manner consistent with the Due Process Clause of the Fourteenth Amendment. While this Court has repeatedly held that the Due Process Clause does not make applicable to the states the entire Bill of Rights of the Federal Constitution (*Adamson* v. *California*, 332 U. S. 46 (1947) and cases cited), the recent decision in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), recognized that unreasonable searches and seizures are prohibited by the Due Process Clause of the Fourteenth Amendment as well as by the Fourth (338 U. S. at 27-28 and 39). See also *Stefanelli* v. *Minard*, 342 U. S. 117, 119 (1951); *Irvine* v. *California*, 347 U. S. 128, 132 (1954).[5]

Thus the decisions of this Court establish that a command to produce books and records may, because it is unduly broad, be unreasonable and hence unconstitutional. The present case brings to this Court a comparable question—whether such a command is not just as unreasonable and hence just as unconstitutional when, as here, it is wholly lacking in basic procedural safeguards which would prevent unwarranted seizure or indefinite impounding or indefinite detention of the books and records in the state to which removal is being required. It would in no way detract from the dignity and the effectiveness of the law enforcement process for New Jersey to be required to

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[5] It is true that the *Wolf* case and its successors have shown that considerable divergence of view exists among the Justices of this Court as to the remedies available after an unconstitutional search or seizure has occurred as a result of state action. But in the case at bar no such situation is now presented, since the granting of certiorari and a definitive determination by this Court would prevent in advance the occurrence of any such unconstitutional state action.

impose adequate safeguards as a condition of granting such an order. In that way a proper balance would be maintained between the interests of the state and the constitutional protections afforded to the individual.

CONCLUSION

While the federal question presented is, as has been stated, a novel one for this Court, it raises issues of public importance to the administration of the law. It is important also to the proper functioning of the system of interstate cooperation which is increasingly vital to the welfare of the nation. In this area the final responsibility rests upon this Court to determine, under the Due Process Clause, what are the constitutionally permissible solutions to the "real problem of balancing the public interest against private security" (*Oklahoma Press Pub. Co.* v. *Walling, supra,* 327 U. S. at 203). Accordingly, sufficient grounds exist for this Court to exercise its discretionary power of review by granting a writ of certiorari.

Respectfully submitted,

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September 17, 1954.

APPENDIX

ORDERS OF THE SUPREME COURT OF NEW JERSEY *

(captions omitted)

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 21st day of June 1954.

John H. Gildea, Clerk
Clerk of the Supreme Court

Filed, Jun 21, 1954
John H. Gildea, Clerk

ON PETITION FOR RECONSIDERATION OF PETITION FOR CERTIFICATION

This matter having been duly presented to the Court, and no Justice who voted with the majority having moved for a reconsideration, it is Ordered that the petition for reconsideration of petition for certification is denied.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this twenty-eighth day of June 1954.

(s) John H. Gildea, Clerk

Filed, Jun 28, 1954
John H. Gildea, Clerk

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* The order of the Essex County Court (R. 10a-11a) is reproduced, in its material portions, at page 7 above of this petition for a writ of certiorari. The order of the Superior Court, Appellate Division appears at the end of that court's opinion (R. 22a) and simply states: "The order of the Essex County Court is affirmed." As stated in footnote 1, page 1 of this petition for a writ of certiorari, nine additional copies of the record as printed below have been filed with the Clerk of this Court pursuant to Rule 21, paragraph 4.

FILED
OCT 8 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 350

LOUIS B. SAPERSTEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Constitution of the State of New York 8

New Jersey Statutes:
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New York Code of Criminal Procedure:
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IN THE

Supreme Court of the United States

October Term, 1954

No. 350

LOUIS B. SAPERSTEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Argument [1]

POINT I

The petitioner did not raise in the courts below the issue which he now presents to this Court for consideration.

At no timely stage in the proceedings below did the petitioner set forth the specific claim, now advanced in this Court, that the New Jersey statute here involved, as construed, is repugnant to the Due Process clause of the

[1] Pursuant to Rule 40, par. 3, of the Rules of this Court, the items set forth as (a), (b), (c) and (d) of paragraph 1 of that Rule are omitted from this brief.

Fourteenth Amendment to the Federal Constitution.[2] Nor, contrary to the petitioner's contention (Petition, p. 10), did the state courts pass on any such claim (R. 21a).[3]

The petitioner's several disjointed references in the courts below to "due process," and constitutionality generally (see note 2, below), are solely referable to the Constitution of the State of New Jersey, even though the latter does not specifically contain a "due process" clause

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[2] Patently, the excerpts from the petitioner's brief in the Superior Court of New Jersey—set forth in note 3, p. 9, of his petition in this court—contain no such claim.

The excerpt from page 10 is a disjointed expression of "doubt" directed at a court order, which, it is declared, "could readily" deprive one of his property without "due process of law."

The excerpt from page 11 is, similarly, unspecific. It merely states that the statute, previously referred to in the abstract as "a statute," is "unconstitutional" for failure to provide "full protection."

Taken together, the two statements—the only ones made to the New Jersey Superior Court here relied upon by the petitioner—no more specifically, definitively or decidedly set forth an averment of invasion of a federal right than does either one standing alone.

In his petition for certification submitted to the Supreme Court of New Jersey, at p. 19 thereof, the petitioner contended:

> "The situation eminently calls for an adjudication by this Court as to whether the omission of such basic safeguards, in a statute under which it is claimed that a resident of this state may be compelled to transfer his private books and records to a sister state, permits [*sic*] an unlawful deprivation of the property of such individual."

The above is the only conclusory statement contained in that petition on the point on which the petitioner now relies in support of his present claim that he raised in that court the federal question which he petitions this Court to review (Petition, pp. 9-10). The point bore the following heading (Petitioner's Brief in the New Jersey Supreme Court, p. 18):

> "To construe the statute as requiring a witness to transfer his books and records to a sister state, without appropriate safeguards provided in connection with such compulsory transfer, would be to deprive such witness of his property without due process of law."

[3] Page references to the record ("R.") refer to the Appendix attached to the Petition for Certification filed in the Supreme Court of New Jersey, copies of which have been filed with the Clerk of this Court for consideration by this Court. See Petition, p. 1, note 1.

(see Petition, p. 10). *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 131, 134; *Bowe* v. *Scott*, 233 U. S. 658, 665.

Accordingly, since this Court would dismiss an appeal from the judgment of the court below for want of jurisdiction, were the petitioner seeking review as a matter of right (*Herndon* v. *Georgia*, 295 U. S. 441, 442-443, reh. den. 296 U. S. 661), the Court, it is submitted, should do no less on the instant application addressed to its "sound judicial discretion" (Rule 19, par. 1, of the Rules of this Court).

The first time the petitioner raised in identifiable form the federal question he urges in this Court was on a petition for reconsideration addressed to the Supreme Court of New Jersey, after that Court, the highest in the state, had denied his petition for certification.[4] The Supreme Court

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[4] The petitioner stated in his petition for reconsideration (p. 1):

> "Moreover, one of the questions raised in the petition [for certification] and included among the reasons and basis for certification, plainly and unmistakably, and not merely colorably, involved the constitutionality of the Uniform Act, in juxtaposition to the due process clause of the Federal Constitution."

This contention does violence to the facts. See note 2, *supra*. Moreover, the manner in which the question was purportedly raised suffers by comparison with the manner in which petitioner "plainly and unmistakably" raised another and independent federal question in the New Jersey Superior Court, later omitted from his brief in the New Jersey Supreme Court. He declared, at p. 15 of his brief in that court:

> "We contend that the Act is unconstitutional * * * namely, that it violates Article I, Section 10 of the Federal Constitution.
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> * * *
>
> "Article I, Section 10 of the Federal Constitution prohibits a state from entering into any treaty, alliance or confederation, and from entering into any agreement or compact with another state without the consent of Congress. As far as we have been able to ascertain in the limited time available to us, Congress has not consented to the arrangement or compact between New York and New Jersey, as expressed in their reciprocal statutes. Absent such consent, the Act violates the constitutional provision above referred to and is, therefore, invalid."

[This argument was evidently abandoned due to the fact that, as pointed out by the respondent, such legislation had been expressly authorized by the Congress in 1934 (see U. S. C. Title 4, §111)].

denied the petition for reconsideration without opinion (Appendix to Petition, p. 16). Thus, it is well settled, his claim comes too late for consideration in this Court. *Simmerman* v. *Nebraska,* 116 U. S. 54; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 163; *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128. See also: *Chicago, Indianapolis &c. Ry. Co.* v. *McGuire,* 196 U. S. 128, 132; *McMillen* v. *Ferrum Mining Co.,* 197 U. S. 343, 347; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 118; *Bowe* v. *Scott,* 233 U. S. 658, 663; *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U. S. 240, 241; *Bilby* v. *Stewart,* 246 U. S. 255, 257; *Wall* v. *Chesapeake & Ohio Ry. Co.,* 256 U. S. 125, 126; *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443.

POINT II

The petitioner does not raise a real and substantial federal question for consideration in this Court.

The petitioner acknowledges that, in so far as the New Jersey statute provides the authority for the issuance of the order below, which compelled him, a New Jersey resident, personally to appear and testify in a criminal proceeding in New York (R. 10a-11a), the statute is consistent with the requirements of the Due Process Clause of the Constitution of the United States [Petition, p. 8; Petitioner's Brief in the New Jersey Supreme Court, p. 19; see *In re Cooper* (Sup. Ct. 1941), 127 N. J. L. 312, 22 A. 2d 532]. He concedes, and properly so, that the statute meets federal constitutional requirements of due process of law because under its authority a witness may be compelled to appear and testify in another state only if certain specified "safeguards" are guaranteed him—

materiality of his testimony, lack of undue hardship in appearing, a limit upon the period of time he may be compelled to remain in the other state, and immunization from arrest and service of process while present there. However, he argues, the statute, as construed, does not throw safeguards "of any nature" around books and records produced under compulsion (Petition, pp. 3, 8). Specifically, the petitioner complains that he has no assurance that his records will not be "impounded or indefinitely detained" in New York when produced there by him (Petition, p. 3; Petitioner's Brief in the New Jersey Supreme Court, p. 19). Accordingly, he contends, the statute as construed violates the Due Process Clause of the Federal Constitution.

This contention is specious. Manifestly, since the statute does not specifically provide for ordering the production of books and records in the first instance, it, of necessity, does not promulgate conditions in the absence of which they need not be produced. That is not to say, however, that they may be ordered produced without regard to basic and settled notions of justice and fair play. This requirement, it is submitted, was amply met by the state court when, after a hearing, it ordered the records produced for a specified period of days by the petitioner, who, himself, was ordered after a hearing to appear and testify, subject to the personal "safeguards" referred to above.

The Appellate Division of the New Jersey Superior Court, in unanimously affirming the order of the lower court, succinctly stated the matter as follows (R. 21a):

> "We also conclude that the statutory protection afforded to persons during periods of appearance as a witness may likewise be afforded to property produced by that witness in answer to the subpoena duces tecum. Mr. Justice Heher, in the case of *In re Cooper,* 127 N. J. L. 312, 313 (Sup. Ct. 1941), con-

> sidered the matter of safeguards for the protection of persons subpoenaed and found the enactment amply conditional against abuse. Under the construction we place upon the term 'subpoena', i.e., to include subpoena duces tecum, we conclude that the protection [*sic*] as to persons are, under the statute, of necessity, implicit as to property or records under a duces tecum form of process. We think it is within the authority of the New Jersey Court to prescribe such condition as may be necessary for the protection of the witness' books and records."

Thus, in the statute as construed, "safeguards" for the protection of a witness' books and records are deemed implicit. This construction is, of course, binding upon this Court. See *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101.

Accordingly, since the petitioner could not successfully, and does not, contest that portion of the order which directs him, personally, to appear and testify on the ground that while present in New York he might be subjected to intimidation, degradation or torture, neither can he successfully advance the position that the statute is unconstitutional in that it provides no specific protection against the impounding and detention of his records. In connection with compelling the petitioner's personal appearance, all that conceivably could be required in the name of constitutional guarantees is met by that provision of the statute which requires the "laws" of New York to give the petitioner protection from arrest and the service of process while in New York (New Jersey Statutes 2A: 81-19; Petition, p. 4), as, in fact, they do (New York Code of Criminal Procedure §618-a, subd. 4; Petition, p. 5).

There need exist no guarantee, nor could one exist, that, after resorting to the Courts of New Jersey for an order compelling petitioner's appearance in New York, the New York authorities would not, upon his appearance,

evince utter effrontery to the judiciary of New Jersey by incarcerating him despite the provisions of the statute. Harmony between the New Jersey statute and the Federal Constitution does not require the state to legislate against a parade of imaginary horribles in which it is suggested by petitioner that law enforcement officials may deceitfully indulge in derogation of their sworn duties.

By the same token, with respect to the books and records ordered to be produced by petitioner, regard for rights secured by the Federal Constitution does not dictate that the statute, as construed, and the order issued pursuant to it, expressly anticipate an impounding or indefinite detention of petitioner's books and records by New York authorities.

Often this Court, because of a studied disinclination to interfere with the rules of evidence and procedure of state courts, has declined to upset judgments of state courts and circumscribe the sphere of influence of a state's police power, even when assertions of invasion of a federal right have been more substantial—indeed, when the assertions were made by one who stood convicted of crime. *Twining* v. *New Jersey*, 211 U. S. 78, 111-112; *Wolf* v. *Colorado*, 338 U. S. 25; *Schwartz* v. *Texas*, 344 U. S. 199. See also; *People* v. *Defore*, 242 N. Y. 13, cert. den. 270 U. S. 657; *Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15; *People* v. *Stemmer*, 298 N. Y. 728, aff'd 336 U. S. 963, reh. den. 337 U. S. 921.[5]

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[5] In the instant case, the petitioner Saperstein, ordered by the New Jersey court to appear in New York in the capacity of a witness material to a Grand Jury investigation in progress in New York (R. 10a-11a), is given immunity from prosecution for "any transaction, matter or thing" concerning which he may be compelled to testify in connection with the books and records which he produces (N. Y. Laws of 1953, ch. 891; N. Y. Penal Law §2447). The immunity accorded him in that respect, and accorded him on the occasions of his interrogations without the books and records, is as

In *Wolf* v. *Colorado*, 338 U. S. 25, this Court declared that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. Mr. Justice FRANKFURTER, speaking for the majority of the Court, declared, at page 28:

> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

POINT III

The petitioner has not been aggrieved by the judgment below.

Apart from the foregoing, there is an additional reason for denial of certiorari.

A statute is tested by its "operation and effect." *Near* v. *State of Minnesota*, 283 U. S. 697, 708. This Court will not decide a constitutional question in advance of necessity for its decision (*Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 105; *Alabama State Federation of Labor, Local Union 103, United Broth. of Carpenters and Joiners of America* v. *McAdory*, 325 U. S. 450); nor will it decide abstract, hypothetical or contingent questions (*United States* v. *Appalachian Power Co.*, 311

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broad as the privilege against self-incrimination under the New York Constitution (*People* v. *Breslin*, 306 N. Y. 294) and, therefore, meets all requirements of federal due process (*Jack* v. *Kansas*, 199 U. S. 372). The immunity, of course, does not extend to the crimes of perjury and contempt. See Petition, p. 8, note 2.

U. S. 377, 423), give advisory opinions (*Hayburn's Case*, 2 Dall. 409, *Coffman* v. *Breeze Corps.*, 323 U. S. 316), or decide any constitutional question except with reference to the particular facts to which it is applied (*Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 429-30).

Here the petitioner's claim is grounded upon the unwarranted speculation that New York officials may or will impound or detain his books and records after he presents them in New York pursuant to the New Jersey order issued under the statute as construed. However, since he has not yet produced his books and records, the petitioner to date has been "deprived" of nothing, with or without due process of law, and, accordingly, this Court, in line with its established practice, should not review a judgment involving an anticipated, rather than actual, deprivation of rights.

This is particularly true since the language of the Superior Court (R. 21a) may leave it open to the County Court, which issued the order, to modify the order, not yet executed, to include "safeguards" to be observed by the New York authorities on production of the records.[6] As a practical matter, no reason can be conceived of—nor is any suggested by the petitioner—why the New York authorities would impound or detain the records, particularly since such action would obviously be disruptive of comity between New York and New Jersey.

The records involved, as disclosed by the nature of the investigation being presently conducted by the Grand Jury before which they are to be produced (Petition, p. 6),

[6] In that connection, it may be observed that the records in question were impounded by the New Jersey courts pending the outcome of the petitioner's appeals in those courts (R. 12a-13a; Petition, p. 2), and such order has remained in effect under the stay granted by Mr. Justice Black of this Court. As matters now stand, therefore, review by this Court of the judgment below would be fragmentary and, thus, undesirable. *Radio Station WOW* v. *Johnson*, 326 U. S. 120.

reflect a large number of complex commercial transactions involving a large number of individuals and organizations (Petition, p. 7). They are of value only to the extent that they may give meaning and life to that about which the petitioner may reasonably be expected to be asked to testify during the limited and specified period of time when, under the terms of the order and stay of the New Jersey County Court, he is to appear before the New York Grand Jury together with them (R. 10a-11a, 12a-13a). The records, of course, will be examined when produced by the petitioner before the Grand Jury. Undoubtedly, he will be questioned concerning some of the entries therein. But no amount of speculation suggests any purpose, devious or legitimate, which would be served by impounding or indefinitely detaining the records after the petitioner has completed any testimony he may give concerning them.

In view of the foregoing, it is abundantly clear that the petitioner's claim—that the statute as construed deprived him of his property, records, in derogation of the Due Process Clause of the Fourteenth Amendment of the Federal Constitution—is frivolous. It presents no real and substantial federal question for review by this Court in the exercise of its sound judicial discretion. *Millingar* v. *Hartupee*, 73 U. S. (6 Wall.) 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 532; *St. Louis, etc. Ry.* v. *Missouri*, 156 U. S. 478, 483; *Wilson* v. *North Carolina*, 169 U. S. 586, 595.

As this Court declared in the *New Orleans* case, *supra*, in language particularly apposite here (142 U. S., at p. 87):

> "• • • the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

Delay, we believe, is the primary objective of the petitioner, in order to hamstring, if possible, the grand jury investigation. Since, as already observed (*supra,* p. 7, note 5), he has or will receive complete immunity from prosecution for any crimes about which he may be asked to testify, it seems that his real purpose is to conceal or withhold from the grand jury evidence implicating others higher in the criminal hierarchy than himself, who are the real targets of the investigation. In order to do so, he has sought to invoke the jurisdiction of this Court for the very reason condemned in the above case.

Conclusion

The petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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October, 1954

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 350

LOUIS B. SAPERSTEIN, PETITIONER

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S REPLY

I

A word should be said in reply to respondent's claim that the federal question presented is not properly before this Court. This matter has been fully dealt with in the Petition for Certiorari (pages 8-10), which made it clear that under the applicable decisions of this Court the federal question is now properly here for review.

The Petition for Certiorari set forth two decisions in comparable situations, *Copperweld Steel Co.* v. *Industrial Comm.*, 324 U. S. 780, 785 (1945); *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 69 (1928), and showed how those decisions sustain this Court's jurisdiction in the present case. The Response makes no effort to show that those two decisions are inapplicable.

Instead the Response places mistaken reliance on two

other, and prior, cases which on examination will be found wholly wide of the mark.

Respondent's first case is *Miller* v. *Cornwall Railroad Co.*, 168 U. S. 131, 134 (1897). There, until motion for reargument in the highest state court, the plaintiff in error had contended merely that the state law was "unconstitutional and void". This Court held there was a presumption that this referred to the state Constitution. Hence the federal question, not having been properly presented to or considered by the state courts, was not available for review in this Court. Unlike the present case, no claim was set up in the specific language which appears in the Fourteenth Amendment of the Constitution of the United States.

Respondent's second case is *Bowe* v. *Scott*, 233 U. S. 658, 665 (1914), where in the Virginia courts the plaintiffs in error had contended they were being deprived of property rights "without due process of law". But unlike the New Jersey Constitution in the present case, the Virginia Constitution did contain a "due process of law" clause and this Court accordingly held the claim of right was referable to the state Constitution.

In neither *Miller* nor *Bowe* did the record establish—as it does in the present case—that the question was intended or was understood by the state court to be a question arising under the Fourteenth Amendment.

II

Respondent claims the federal question presented lacks substantiality. The reasons which warrant granting the writ—and which show the substantiality of the federal question—have been covered at pages 11-15 of the Petition.

III

Respondent also suggests that petitioner may not yet have been aggrieved by the final judgments of the New

Jersey state courts—in other words, that petitioner's constitutional contention is being prematurely advanced.

In respondent's view of the matter, petitioner should be required to take his books and records from New Jersey to New York without procedural safeguards of any nature being imposed in advance to protect petitioner in complying with such removal order. Respondent's position apparently is that petitioner, before complaining, should wait until he has presented his books and records in New York and has thus been coerced into subjecting them to New York's jurisdiction.

But the basis of petitioner's constitutional contention is that the Due Process Clause protects him from being required to move his books and records to New York under a procedure wholly lacking in adequate safeguards. He should not be compelled first to comply with this invalid procedure, and then hope that the State of New York will voluntarily supply safeguards where none has been imposed by the statute and the judgments under review. "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409 (1900).

Thus a procedure which, because of its fundamental defects, is in conflict with the Due Process Clause is not a procedure with which petitioner should be required to comply. Compare *Kunz* v. *New York*, 340 U. S. 290, 294-295 (1951), and cases cited; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 412, 424-426 (1915).

Indeed, as the Petition for Certiorari shows (page 14), recent decisions of this Court leave in considerable doubt the remedies that may be available to an aggrieved party after an unconstitutional search and seizure has actually occurred. On this state of the authorities, it is especially important that in the present proceeding petitioner should

be able to obtain the full measure of the constitutional protection which the Due Process Clause of the Fourteenth Amendment assures. Since the New Jersey statute and the court orders issued thereunder have failed to provide such protection, there is nothing premature and nothing hypothetical about the federal question now presented.

An illustrative analogy exists in interstate extradition proceedings. If the State of New York wishes to extradite a person from the State of New Jersey, it is open to that person to contest the validity of the proceeding in the courts of New Jersey before his custody is transferred. *Hyatt* v. *New York*, 188 U. S. 691 (1903); *Illinois ex rel. McNichols* v. *Pease*, 207 U. S. 100, 109 (1907); *South Carolina* v. *Bailey*, 289 U. S. 412, 420-422 (1933). His standing to question the basic validity of the proceeding is not deferred until after he has been compelled to return to the demanding state. Similarly, in the case at bar it is wholly appropriate for petitioner to challenge the basic validity of this procedure before a forced transfer of his books and records is required to be made from the State of New Jersey, where he resides, to the jurisdiction of the State of New York.

Respectfully submitted,

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OCTOBER 11, 1954.